(2)

No. 04-858

In the Supreme Court of the United States

MICHAEL J. GRASSO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the word "proceeds" in the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), which makes it a crime, *inter alia*, to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote the carrying on of those activities, means the gross receipts from the unlawful activities or only the profits —*i.e.*, gross receipts less expenses.

2. Whether the enhancement, under the Sentencing Guidelines, of petitioner's sentence for money laundering based on the amount of money he laundered violated the Sixth Amendment because it rested on a factual determination not made by the jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 381 F.3d 160. The memorandum, order, and judgment of the district court (Pet. App. 23a-34a, 35a-41a, 42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2004. The petition for rehearing was denied on September 21, 2004 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on December 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 10 counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343; and 480 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).[1] He was sentenced to 97 months of imprisonment, to be followed by a three-year term of supervised release. In addition, he was fined $150,000, and ordered to pay restitution in the amount of $761,126.39 and a special assessment of $49,500. The court of appeals affirmed the convictions and sentence, but vacated the restitution order and remanded the case to the district court for reconsideration of that order. Pet. App. 1a-22a; *id.* at 23a.

1. The evidence at trial established that, from early 1997 to late 1999, petitioner fraudulently sold various work-at-home programs. Pursuant to his scheme, petitioner placed advertisements in national magazines and sent direct mailings stating that, for a fee ranging from $10 to $40, purchasers could become employed stuffing envelopes and stapling booklets at home. When purchasers mailed in their money, they received a set of written instructions that explained how they too could place advertisements offering work-at-home employment similar to those to which they had responded. During the period covered by the scheme, petitioner deposited over $10 million into various bank accounts. Petitioner used the proceeds of his fraudulent activity to

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[1] Although the petition states (Pet. 2) that petitioner was convicted on 482 counts of money laundering, two of those counts were dismissed at trial. Pet. App. 4a n.4; *id.* at 23a.

cover the advertising, printing, telephone and mailing expenses of the ongoing scheme. Pet. App. 3a, 36a-37a.

2. The federal money laundering statute at issue here makes it a crime when anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1). In essence, subsection (A)(i) prohibits transactions involving the proceeds of specified crimes to promote any of those crimes, and subsection (B)(i) prohibits transactions involving the proceeds of specified crimes to conceal the fact that they are the product of crime.

The money laundering statute defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering acts enumerated in 18 U.S.C. 1961(1) (2000 & Supp. I 2001). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include mail fraud in violation of

18 U.S.C. 1341, and wire fraud in violation of 18 U.S.C. 1343. See 18 U.S.C. 1961(1)(B) (2000 & Supp. I 2001).

3. As relevant here, petitioner was charged with and convicted of violating the promotion subsection of the money laundering statute, 18 U.S.C. 1956(a)(1)(A)(i), by using the proceeds of his fraudulent scheme to cover the scheme's advertising, printing, telephone and mailing costs, and thereby to facilitate the continuation of the scheme.

More than seven months after the jury verdict, petitioner filed in the district court a motion for judgment of acquittal on the money laundering counts, relying upon *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002). He argued for the first time that, because "proceeds" in the money laundering statute means "profits," the government's evidence that he used funds from his fraudulent scheme to pay overhead expenses of the scheme was insufficient to support his convictions on those counts. Pet. App. 7a-8a & n.8. Although the motion was untimely under Federal Rule of Criminal Procedure 29, the parties agreed that the district court could consider the motion for the limited purpose of determining whether petitioner should be sentenced under the Sentencing Guidelines for money laundering or under those for fraud. Pet. App. 8a; *id.* at 36a & n.4. The district court rejected petitioner's argument. Reasoning that *Scialabba* was "susceptible to criticism on several grounds," it concluded that "proceeds" means gross revenues. *Id.* at 40a.

4. a. As relevant here, the court of appeals affirmed petitioner's money laundering convictions. As an initial matter, the court concluded that, by failing to raise his claim in a timely motion for judgment of acquittal under

Federal Rule of Criminal Procedure 29, petitioner forfeited his argument that the word "proceeds" in the money laundering statute denotes net profits rather than gross receipts. Accordingly, the court held that his claim was reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). Pet. App. 7a-10a.

The court of appeals held that petitioner could not meet that standard because the district court had committed no error. The court concluded that "proceeds" as used in the money laundering statute means gross receipts rather than net profits. Pet. App. 11a-17a. In reaching that conclusion, the court considered "the conventional understanding of the term, the text and purpose of § 1956, and existing case law in [the Third] Circuit." *Id.* at 12a.

After noting that Section 1956 does not define "proceeds," the court of appeals consulted dictionary definitions of the word and found them "neither uniform nor dispositive." Pet. App. 13a. The court observed that judicial constructions of the word in other statutory contexts "also vary," though it observed that, in construing the scope of criminal forfeiture of "proceeds" under the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, 18 U.S.C. 1963(a)(3), most courts have held that proceeds involve "more than net profits." Pet. App. 13a-14a. The court further observed that the Seventh Circuit is alone in its "restrictive definition" of "proceeds" in the money laundering statute, *id.* at 14a, and that the First Circuit in *United States* v. *Iacaboni*, 363 F.3d 1, 4, cert. denied, 125 S. Ct. 480 (2004), specifically rejected the Seventh Circuit's view that "proceeds" in that statute means profits rather than total revenue, Pet. App. 14a-15a.

The court of appeals ultimately concluded that "the best approach * * * is to examine the statute itself for indications of the intended scope of the term." Pet. App. 15a. The court explained that, although the money laundering statute criminalizes financial transactions aimed at the concealment of proceeds—the "conventional understanding" of money laundering—it also criminalizes financial transactions aimed at promoting illegal activity. *Id.* at 15a-16a. The court concluded that "[b]y reinvesting the proceeds of his fraudulent scheme in order to sustain it, [petitioner] promoted unlawful activity within the meaning of the statute—regardless whether the funds were profits or gross receipts." *Id.* at 16a.

The court of appeals observed that, in *Scialabba*, the Seventh Circuit was concerned that, if "proceeds" means "gross income," then, as a matter of statutory construction, it might not be appropriate to convict a defendant of both money laundering and the underlying "specified criminal activity." Pet. App. 16a (citing *Scialabba*, 282 F.3d at 477). The court here rejected that concern. It relied (Pet. App. 17a) on its previous decision in *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994), which held that prosecution for a substantive offense and for money laundering to promote that offense does not implicate double jeopardy when the statutory elements of the offenses differ. *Id.* at 978-979. It also noted (Pet. App. 17a) its previous decision in *United States* v. *Omoruyi*, 260 F.3d 291 (3d Cir. 2001), cert. denied, 534 U.S. 1100 (2002), which held that "conduct constituting the underlying offense conduct may overlap with the conduct constituting money laundering." *Id.* at 295.

Finally, the court of appeals explained that it had "regularly" upheld money laundering prosecutions based on the reinvestment of proceeds without ever suggesting that "proceeds must be net." Pet. App. 17a. Finding "no reason to adopt such a requirement now," the court concluded that "proceeds," as the word is used in Section 1956, "means simply gross receipts from illegal activity," and that "[a]n individual may engage in money laundering regardless whether his or her criminal endeavor ultimately turns a profit." *Ibid.* Accordingly, the court held that petitioner had failed to establish "error of any sort, let alone plain error." *Ibid.*

b. After oral argument in the court of appeals but before the court issued its decision, petitioner submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j), relying on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). Petitioner contended that his sentence for money laundering violated the Sixth Amendment because it included an 18-level enhancement based on the amount of money he laundered (see Sentencing Guidelines §§ 2B1.1(b)(1), 2S1.1(a)(2) (2001)) without any jury determination of that amount. The court of appeals did not address that argument in its decision.

DISCUSSION

1. Petitioner seeks review on the question whether "proceeds" within the meaning of 18 U.S.C. 1956(a)(1)(A)(i) means "net profits" rather than "gross receipts," contending that the decision below conflicts with the Seventh Circuit's holding in *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002). The court of appeals correctly rejected the view that "proceeds" means net profits, and, although there

is a conflict in the circuits on that question, further review of the issue is not warranted in this case.

a. As the Third Circuit noted, Pet. App. 14a-15a, its ruling in this case that the word "proceeds" means gross receipts and not profits is consistent with the First Circuit's decision in *United States* v. *Iacaboni*, 363 F.3d 1, cert. denied, 125 S. Ct. 480 (2004). In *Iacaboni*, the defendant pleaded guilty to laundering the proceeds of an illegal sports gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i), by using the proceeds of the operation to, among other things, pay winning bettors. 363 F.3d at 3, 4. On appeal, the defendant contended that the district court's order forfeiting property "involved in" the money laundering offense under 18 U.S.C. 982(a)(1) (Supp. I 2001) was erroneous because his payments to winning bettors were an integral part of the gambling operation and therefore could not constitute money laundering. 363 F.3d at 4. The court of appeals rejected that claim, holding that the word "proceeds" in the money laundering statute does not mean net profits. *Ibid.*

The definition of "proceeds" adopted by the court below is also consistent with the definition used by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that rested on the contention that the word "proceeds" is unconstitutionally vague. The court of appeals held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Haun*, 90 F.3d at 1101 (emphasis added) (quoting *Webster's Third New*

International Dictionary 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the word "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 (2000).

As both the court below (Pet. App. 14a-17a) and the *Iacaboni* court (363 F.3d at 4) explicitly recognized, however, the Seventh Circuit has taken the contrary view, defining the word "proceeds" in the money laundering statute as "profits." In *Scialabba*, the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week they opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to pay the outlet owners for their role, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See *Scialabba*, 282 F.3d at 476. For these expenditures, they were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions on the ground that "proceeds" in the money laundering statute means "profits" and that funds used to cover the overhead expenses of an illegal activity are not "proceeds" under that definition. 282 F.3d at 477. That decision is irreconcilable with the holding of the court below that "proceeds" are not limited to profits for purposes of the money laundering statute. In a more recent case involving the meaning of the word "proceeds" in the

RICO forfeiture provision, 18 U.S.C. 1963(a)(3), a panel of the Seventh Circuit, citing *Scialabba*, reaffirmed its view that "proceeds" means "profits." *United States* v. *Genova*, 333 F.3d 750, 761 (2003).

b. The conflict over the definition of "proceeds" in the money laundering statute raises an issue of recurring importance. Indeed, the government petitioned for a writ of certiorari in *Scialabba* to obtain resolution of that issue. This Court, however, denied the petition. 537 U.S. 1071 (2002) (No. 02-442). At that time, the disagreement in the circuits over the meaning of the word "proceeds" in the money laundering statute was not as pronounced as now. If the circuit conflict persists, review of the issue by this Court would be warranted in an appropriate case. This case is not a suitable vehicle for review of that question, however, for two independent reasons.

i. Because the applicable standard of review is "plain error," a definitive interpretation of the meaning of "proceeds" in the money laundering statute would not be necessary to resolve this case.

As the court of appeals held, and petitioner does not in this Court dispute, petitioner did not timely raise in the district court the claim he asserts here, and he is thus entitled only to plain-error review. Pet. App. 7a-11a. To establish plain error, petitioner must demonstrate, among other things, that any error in the district court's failure to grant a judgment of acquittal based on petitioner's "proceeds" argument was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Petitioner cannot (and does not attempt to) make that showing.

As discussed above (pp. 7-9, *supra*), with the sole exception of the Seventh Circuit, the courts of appeals

that have addressed the question have concluded that "proceeds" in the money laundering statute means gross receipts, not profits. That is the word's most common and primary meaning. See, *e.g.*, *Random House Dictionary of the English Language* 1542 (2d ed. 1987) 1542 (providing, as the initial definition of "proceeds," "something that results or accrues" and "the *total* amount derived from a sale or other transaction") (emphasis added); *Black's Law Dictionary* 1222 (7th ed. 1999) (defining "proceeds" as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale. 2. Something received upon selling, exchanging, collecting or otherwise disposing of collateral," and distinguishing "proceeds" from "net proceeds," which it defines as "[t]he amount received in a transaction minus the cost of the transaction (such as expenses and commissions)").

Moreover, courts have interpreted the word "proceeds" in related statutes to mean gross receipts. For example, again with the sole exception of the Seventh Circuit, courts of appeals have rejected the notion that "proceeds" in the RICO statute, 18 U.S.C. 1963(a)(3), means net profits. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998) (defining "proceeds" as "gross revenues"); *United States* v. *DeFries*, 129 F.3d 1293, 1314 (D.C. Cir. 1997) (same); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995) (same), cert. denied, 517 U.S. 1105 (1996); *United States* v. *Lizza Indus., Inc.*, 775 F.2d 492, 497-499 (2d Cir. 1985) (defining "proceeds" as "gross profits," meaning total revenue minus direct costs but not indirect operating expenses or taxes), cert. denied, 475 U.S. 1082 (1986); but see *Genova*, 333 F.3d at 761. See also *United States* v. *McHan*, 101 F.3d 1027, 1041-1043 (4th Cir. 1996) (reject-

ing a "net income" definition of "proceeds" as used in the drug trafficking statute, 21 U.S.C. 853), cert. denied, 520 U.S. 1281 (1997).

Finally, the notion that "proceeds" *obviously* means profits cannot be squared with the numerous cases in which courts of appeals, without analyzing whether the funds at issue were "profits," have found sufficient evidence to support money laundering convictions based on the use of illegal funds to pay the expenses of the criminal operation.[2]

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[2] See, *e.g.*, *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (payments by prostitute to escort agency from proceeds of prostitution), cert. denied, 537 U.S. 857 (2002); *United States* v. *Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (use of proceeds from Ponzi scheme to pay "interest" to dissatisfied investors to promote continuation of scheme), cert. denied, 535 U.S. 1069 (2002); *United States* v. *Barragan*, 263 F.3d 919, 924 (9th Cir. 2001) (use of drug proceeds to rent motel rooms for conducting future drug transactions); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (use of drug proceeds to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hillebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud scheme to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984, 990 (5th Cir.) (use of proceeds of telemarketing fraud to pay co-conspirators and cover overhead expenses), vacated, 111 F.3d 376 (5th Cir. 1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir.), cert. denied, 518 U.S. 1020 (1996) (use of proceeds from fraud scheme to compensate individuals for referring victim).

Indeed, petitioner's reliance (Pet. 12) on the rule of lenity effectively concedes that it is not clear or obvious that "proceeds," as used in the money laundering statute, means profits. As this Court has explained, the rule of lenity comes into play only if there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even "after 'seizing every thing from which aid can be derived'" the Court is "left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

Accordingly, any error by the courts below was not "plain error." This is therefore not a suitable vehicle to review the first question presented because, even were the Court to conclude that "proceeds" means net profits, it would have to affirm the judgment below.[3]

ii. The circuit conflict also may not persist. The Acting Solicitor General has authorized the government to seek initial en banc review in an appeal currently pending in the Seventh Circuit to ask that circuit to reconsider its holding in *Scialabba* that "proceeds" means net profits.

In *United States* v. *Santos*, 342 F. Supp. 2d 781, 798-799 (N.D. Ind. 2004), a district court in the Seventh Circuit recently vacated a defendant's convictions for

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[3] Contrary to petitioner's assertion (Pet. 7, 16), the United States did not take the position in its brief in opposition to the petition for certiorari in *Iacoboni* that this case was a suitable vehicle to review the "proceeds" issue. See U.S. Br. in Opp., *Iacaboni*, *supra* (No. 04-183). Rather, the government compared certain aspects of the *Iacaboni* decision to the decision in this case to demonstrate the distinct reasons why *Iacaboni* was an unsuitable vehicle to review the "proceeds" question. *Id.* at 12, 14.

promotional money laundering in reliance on *Scialabba*. Granting the defendant's petition under 28 U.S.C. 2255, the district court concluded that the defendant's use of gross receipts from his illegal gambling operation to pay his winning customers and his money collectors did not violate Section 1956(a)(1). 342 F. Supp. 2d at 799. The Acting Solicitor General has authorized the government to appeal that decision and to seek initial en banc review in the Seventh Circuit to challenge directly the holding in *Scialabba* that "proceeds" in the money laundering statute means net profits rather than gross receipts.

There is reason to believe the Seventh Circuit may grant en banc review in *Santos*. When the government petitioned for rehearing en banc in *Scialabba*, an evenly-divided court (with Judge Williams recused) denied the petition. See *Scialabba*, 282 F.3d at 475 & n.*. Since that time, the conflict in the circuits has widened with the issuance of the decisions by the Third Circuit in this case and by the First Circuit in *Iacaboni*. Until the Seventh Circuit has had an opportunity in *Santos* to reconsider *Scialabba* in light of the subsequent decisions from other circuits expressly rejecting its holding, review by this Court would be premature.

2. Petitioner also contends that his sentence under the federal Sentencing Guidelines violates the Sixth Amendment because the district court increased his sentence based on a fact—the amount of money he laundered (see Sentencing Guidelines §§ 2B1.1(b)(1), 2S1.1(a)(2) (2001))—that was not found by the jury. Petitioner relies on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), which held that a sentence imposed under the Washington State sentencing guidelines violated the Sixth Amendment because the defendant's sentence was enhanced based on facts not found by the jury. Sub-

sequent to the filing of the petition in this case, this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *United States* v. *Booker*, 125 S. Ct. 738, 748-756 (2005) (Stevens, J., for the Court). In answering the remedial question in that decision, the Court applied severability analysis and held that the guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 757-764 (Breyer, J., for the Court). Accordingly, with respect to question two in the petition, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*. The court of appeals can then decide what effect, if any, that decision has on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See *id.* at 769.

CONCLUSION

With respect to the first issue presented, the petition for a writ of certiorari should be denied. With respect to the second issue, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* v. *United States*, 125 S. Ct. 738 (2005).

Respectfully submitted.

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